IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 295

COLONEL HENRY S. ROBERTSON, President, Army Review Board, *Petitioner*

v.

ROBERT H. CHAMBERS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE RESPONDENT.

H. RUSSELL BISHOP,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia (R. 19) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22-28) is reported at 183 F. 2d 144.

JURISDICTION.

The judgment of the court of appeals was entered on June 12, 1950 (R. 29). The petition for a writ of certiorari was filed on September 8, 1950 and granted on November 27, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Respondent believes that the question presented for decision is, as stated in the brief in opposition, namely:

Where an enabling statute creating an administrative board limits by specific description the documentary evidence which shall constitute the record before such board, and the head of such board has disregarded the limitation by adding documents of an entirely different class to such record, and refuses to remove such documents upon the request of the party entitled to be heard, may the party entitled to be heard apply for and obtain a mandatory order from the court compelling the removal of said documents?

STATUTES INVOLVED.

1. Sections 302(a) and (b) of the Servicemen's Readjustment Act of 1944, 58 Stat. 287, as amended, 59 Stat. 623 (38 U. S. C. 693i (a) and (b), which authorized the creation of the Army Disability Review Board and defined its duties and powers, provide as follows:

> (a) The Secretary of the Army, the Secretary of the Navy, and the Secretary of the Treasury are authorized and directed to establish, from time to time, boards of review composed of five commissioned officers, two of whom shall be selected from the Medical Corps of the Army or Navy, or from the Public Health Service, as the case may be. It shall be the duty of any such board to review, at the request of any officer retired or released from active service, without pay, for physical disability pursuant to the decision of a retiring board, board of medical survey, or disposition

board, the findings and decisions of such board. Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer. Witnesses shall be permitted to present testimony either in person or by affidavit, and the officer requesting review shall be allowed to appear before such board of review in person or by counsel. In carrying out its duties under this section such board of review shall have the same powers as exercised by, or vested in, the board whose findings and decision are being reviewed. The proceedings and decision of each such board of review affirming or reversing the decision of any such retiring board, board of medical survey, or disposition board shall be transmitted to the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Treasury, as the case may be, and shall be laid by him before the President for his approval or disapproval and orders in the case.

(b) No request for review under this section shall be valid unless filed within fifteen years after the date of retirement for disability or after (June 22, 1944), whichever is the later.

2. The powers of the Army Retiring Board, "the board whose findings and decision are being reviewed" in this case, and which are specifically vested in the Army Disability Review Board by Section 302 (a), *supra*, are set forth in R. S. 1248 (10 U. S. C. 963):

> A retiring board may inquire into and determine the facts touching the nature and occasion of the disability of any officer who appears to be incapable of performing the duties of his office, and shall have such powers of a court-martial and of a court of inquiry as may be necessary for that purpose.

STATEMENT.

Respondent, Robert H. Chambers, was honorably discharged, for physical disability, as a Captain in the Army on October 2, 1942, pursuant to the decision of an Army

Retiring Board. Subsequent to the passage of the Servicemen's Readjustment Act of 1944, he applied to the Army Disability Review Board for a review, under Section 302 of that Act, of the findings and decision of the Army Retiring Board.[1] A hearing was held by the Review Board on a record which, conformably to the statute, consisted solely of respondent's service records and evidence submitted by him. (R. 4). The Review Board, on June 11, 1945, reversed in part and affirmed in part the findings of the Retiring Board. (R. 4) Respondent requested a rehearing and this request was granted on May 19, 1947. (R. 4) On being notified that the rehearing would be held on October 10, 1947, respondent and his counsel went to the Pentagon to examine respondent's record and prepare for the rehearing (R. 4). Examination of the record disclosed that certain Veterans' Administration reports, written in 1944, two years after respondent's discharge from the Army, had been added to the record in respondent's case. (R. 4-5). Respondent requested that these Veterans' Administration reports be removed from his record on the ground that they were not "service records" and that by the terms of the statute respondent's record must be confined to respondent's service records and such evidence as respondent should submit (R. 5, 8, 9). This request was denied (R. 5, 9, 10); request was made for reconsideration and this in turn was denied (R. 5, 10-16). The rehearing was postponed twice at respondent's request, was finally set for April 6, 1948, and has never been held (R. 23) by reason of the bringing of this action on March 29, 1948.

This action was commenced in the District Court of the United States for the District of Columbia against Brigadier General Danforth, the then President of the Review Board in his official capacity (R. 2). The relief sought was the issuance of a mandatory order directing the President

[1] The complaint, par. 6 alleges that he applied for "a review of his discharge" (R. 4). As is apparent from the remainder of the complaint, and the wording of the statute it was for a review of the findings and decision of the retiring board that application was made.

of the Review Board to exclude the Veterans' Administration reports from respondent's record, and to restrict such record to respondent's service records and documents submitted by respondent as evidence. (R. 2-6).

The case was heard on a motion to dismiss the complaint (R. 17-18). The District Court granted the motion on the grounds (a) the action was prematurely brought because of failure to exhaust administrative remedies, and (b) on the merits because the Court lacks jurisdiction to control the admissibility of evidence by an administrative board by mandamus. (R. 19).

Respondent appealed and during the pendency of the appeal Colonel Henry S. Robertson, petitioner herein, was substituted as appellee (R. 21-22). The Court of Appeals reversed, holding "the fact situation is undisputed; the statute is clear; and the violation thereof by the Board is plain." (R. 28) The judgment directed the District Court to enter judgment "requiring the Board to withdraw the Veterans' Administrations reports from the record before it." (R. 28).

ARGUMENT.

I.

Section 302 of the Servicemen's Readjustment Act of 1944 Prohibits the Use of Post-Discharge Veterans' Administration Reports by the Army Disability Review Board.

The statute after providing for the establishment of Disability Review Boards, sets forth in definite terms the record upon which such review shall be based, in the following words:

> "Such review shall be based upon all available service records relating to the officer requesting such review, and such other evidence as may be presented by such officer."

This controversy arose when respondent requested that certain Veterans' Administration reports which had been

added to Army records, be removed from his record. His reason for requesting the removal was plainly stated in a letter dated September 24, 1947, addressed to the then President of the Review Board (R. 8-9). The third paragraph of that letter stated:

> "Captain Chambers was discharged on October 4, 1942, and any reports by the Veterans Administration subsequent to that date would not be a part of his service record. The term "service records" as used in the statute obviously means the records of the branch of the armed services of which the officer was a member prior to his discharge, and does not include the records of other departments of the government."

The reply to this letter stated that the request was denied because the quoted part of the statute "is descriptive in character" (R. 10). Reconsideration was requested and the contentions of the respondent were set forth at some length (R. 10-15). The request for reconsideration was denied with the statement "no reason is perceived to depart from the views" expressed in the letter denying the original request. (R. 16).

The complaint, and the exhibits thereto, (R. 2-16) squarely raised the issue as to the meaning of the term "service records," which was not met by the motion to dismiss (R. 17-18). Petitioner conceded on argument in the Court of Appeals that the Veterans' Administration reports are not "service records relating to" petitioner. The first time that petitioner has intimated that the Veterans' Administration reports could be classified as "service records" was in a footnote on page 11 of the petition for the writ wherein it is stated that the "assumption" that Veterans' Administration records were not "available service records" is very questionable. The question is argued at great length in the petitioner's brief and it is in reply to that argument that the following is addressed.

At the outset, in order that his position may be made clear to the court and to petitioner, respondent states that

there is no question in this case of retirement pay; Sec. 301 of the Servicemen's Readjustment Act has no bearing upon this case as respondent claims no rights under it, and that insofar as other applicants for review are concerned, respondent has not brought a class action, and this case should be decided upon the facts set forth in the record. In other words it is respondent's case which is before the court, not the case of some three thousand odd discharged or retired officers.

A. The meaning of the term "service records" is well understood by military men and does not include records of another governmental department.

Petitioner's counsel has been unable to find any judicial definition of the term "service records." The Court of Appeals in this case has decided what are not service records, viz., Veterans' Administration reports made after discharge. (R. 24-25).

Respondent's contention is that service records mean the record of the service which a military man has rendered from the time of his entry into the service until his discharge. After he has been discharged he obviously cannot render additional military service, and this being so there cannot be additional service records covering a service never rendered.

As stated above, it has never been seriously argued by petitioner that Veterans' Administration reports were service records until the filing of petitioner's brief. Respondent has always understood petitioner's position to be that the Veterans' Administration reports could be included in his record, not because they are "service records", but because the statute does not mean what it says. Petitioner's argument seems to be that the statute should be read as if it were written as follows:

> "Such review shall be based upon all available service records relating to the officer requesting such review, such other records as the Board shall see fit to

consider, and such other evidence as may be presented by such officer."

In order to make this argument petitioner attempts to distort the meaning of "service records."

Petitioner argues on page 16 of his brief that once the Veterans' Administration reports, being governmental reports, were transmitted to the Army and incorporated into its files that they become official records of the Army department and hence "service records" within the meaning of Section 302 of Servicemen's Readjustment Act of 1944. While it is true that they have been transmitted to the Army they have not been incorporated into its files. As respondent understands the procedure before the Review Board these reports at some time will be returned to the Veterans Administration. Any papers which qualify as service records will always be a permanent part of the records of the War Department concerning the particular person to whom they relate. In the Summary of Argument on page 9 petitioner goes even farther and argues that since the Veterans' Administration reports are temporarily in the files of the Army department that they have become available records of the latter agency in the normal meaning of these words. It is true that in the normal meaning of the word "available" the Veterans' Administration reports when they are actually present in the Department of the Army are available to the Department, but they are not records of the Army and therefore not records of the Service Department and they are not "service records." They, therefore, cannot be a part of "available service records" (the expression used in the statute), nor can they be "all available records of the service department," an expression which petitioner urges is an equivalent rendering of "all available service records."

Petitioner next argues that if the term "service record" does not include Veterans' Administration reports that nevertheless the sentence of the statute which is in dispute

when considered in context with the remainder of Section 302 means that the Review Board must at the least consider available service records and the officer's evidence. In support of this argument petitioner argues that the phrase "shall be based upon" may quite properly be construed to use one of the common dictionary meanings of "base" as— "shall commence or start from". It is true that one of the dictionary meanings of the noun "base" is "commence or start from", but this is used in connection with sports or surveying, neither of which activities is being engaged in by petitioner, nor respondent, nor the court. It is the verb "base" not the noun that is used in the statute and this is defined in Webster's International Dictionary thus:—"To put on a base or basis; to found; to establish, as an argument or conclusion; used with *on* or *upon*.

In further support of this argument on page 18 of petitioner's brief, it is stated that this construction is confirmed by the fact that the statute says that the Board's "*review*" and not the Board's "decision", "shall be based upon the specified evidence." If the Board's review is to be based upon specified evidence then its decision must be based upon the same evidence if the decision is to be one that is just and fair.

Continuing, the petitioner states that in the review of cases by a Disability Review Board the crucial issue is whether the officer should have been retired without pay. Such an argument has no application to this case; the officer was not retired without pay; he was discharged, and he is seeking a review of the findings and decisions of a Retiring Board. He is not seeking retirement with or without pay, he is questioning the findings and decision of the Retiring Board which ruled that he should be discharged for physical incapacity.

With respect to petitioner's argument that section 302 provides that a Review Board shall have the same powers as a retiring board, and that a retiring board by virtue of the provisions of R. S. 1248 has the same powers as a court

martial and a court of inquiry; and, therefore, the Review Board is unrestricted in its investigation,—if this argument is sound then the sentence in Section 302 which definitely states the evidence which shall form the basis of review must be entirely disregarded and the statute read as if that sentence were not in it. It seems obvious that the decision of the Court of Appeals is eminently reasonable and in conformity with the decisions of this court concerning statutory interpretation.

The Court of Appeals said (R. 27):

> "The general language emphasized by Appellee (petitioner here) can and does cover many other matters of practice and procedure. The two statutory provisions must and can be construed so that both may be preserved. Congress never intended to destroy the plainly expressed, required, evidentiary basis for decision by the Board."

The argument of petitioner, commencing on page 22 of its brief and closing on page 25, is simply an argument as to what in petitioner's opinion the statute should provide and not what it does provide. The answer to this argument is, as this court has so often said, the court will not concern itself with whether or not the statute might have been enacted in form otherwise than it was, or make any inquiry as to the wisdom of the statute.

Commencing on page 25 petitioner seems to argue that the Review Board has conferred some great boon upon applicants for review by permitting them to familiarize themselves with the record, which will be considered when their cases come on for hearing. Respondent contends here as he did in his brief in opposition that there is no question of fairness involved. If there is a question of fairness, then it is decidedly unfair to require a party to any proceeding to be required to rebut evidence which the trier of the facts is precluded from considering.

B. The legislative history of Section 302 is of no aid to the petitioner, the respondent, or the Court.

While purportedly devoting 15 pages of his brief to the legislative history of Section 302, petitioner has actually written a most complete and informative history of Section 301, a part of the statute in which we are not here in any way concerned.

It is apparent to anyone who will attempt to trace the legislative history of Section 302, and it is clearly shown from the argument and footnotes contained on pages 27 to 42 of petitioner's brief, the legislative history of Section 302 is as short and simple as the annals of the poor. Actually, Section 302 has no legislative history. Section 302 was written into the Servicemen's Re-Adjustment Act when it was in conference, and there is nothing in the Committee reports or the Congressional debates which throws any light upon the meaning of the term, "service records", or the question as to whether or not the Congress intended that the statute should be read as it is written, or whether in intending to enact one statute it enacted another.

Section 301 sets up what are known as Discharge Review Boards. These Boards function entirely separately and differently from Disability Review Boards and are intended to accomplish entirely different purposes. Disposition of applications pending before a Discharge Review Board is entirely different from that before a Disability Review Board. After a Discharge Review Board has completed its deliberations its findings are final, subject only to review by the respective Secretaries of the Military Departments. On the other hand, the Secretaries of the respective Military Departments have no authority to review the action of a Disability Review Board. Their functions in that respect are limited to transmitting the findings of the Disability Review Board to the President for his approval or disapproval and orders in the case.

That section of the petitioner's brief dealing with the legislative history of 301 is liberally sprinkled with footnotes

containing much irrelevant matter. It discusses the various types of discharges by the respective Military Departments and deals extensively with compensation payments, hospitalization benefits, and various other statutory provisions for assisting disabled soldiers. It is submitted that none of this is cognate to the questions in this case and should be disregarded by the Court.

C. Administrative construction of a statute will not be followed by the courts when a different practice is required.

Petitioner argues (Petitioner's Brief pp. 42-45) that the Court below erred in not deferring to what it is claimed has been the consistent administrative construction of the statute. In support of this contention petitioner cites *U. S. v. Citizens Loan & Trust Company*, 316 U. S. 209, quoting from the court's opinion at p. 214 to the effect that an administrative construction "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." Certainly this is the general doctrine, but the question in this case is not whether there has been administrative construction, but whether (1) there was any necessity for construction and (2) whether the administrative construction is correct. The Court below ruled (R. 28) "the statute is clear; and the violation thereof by the Board is plain."

If the statute is clear there is plainly no necessity for construction; if the violation by the Board is plain then the administrative construction is "clearly wrong and a different construction is plainly required."

Respondent's contention is, as it has always been, that the regulations adopted by the War Department directing the Board to consider "all available War Department and/or other records pertinent to the health and physical condition of the applicant" is directly contrary to the letter and the spirit of the statute, is therefore plainly unreasonable and the rule of deference to the administrative con-

struction will be disregarded by the courts for the very reason that being unreasonable it is "clearly wrong" and therefore a different construction "is plainly required."

D. There is no showing of legislative acquiescence in the construction placed upon the statute by petitioner.

Petitioner in his brief, pp. 45 to 48, argues that since Section 302 was re-enacted on December 28, 1945 without any changes that are particularly pertinent, that the re-enactment should be construed as acceptance and approval of the administrative practice. The fact that Veterans' organizations described on page 48 of petitioner's brief as "informal watch-dogs" of the Review Boards, have expressed no dissatisfaction with the construction placed upon the statute by the petitioner in no way proves that the question as to the construction of the act was ever before the Congress, and that in re-enacting the statute as it did it in any way intended to approve such a construction.

II.

The Same Limitations Apply to a Re-Hearing Before an Administrative Board as Apply to an Original Hearing.

Petitioner cites no case in support of its argument (Petitioner's Brief pp. 48-50) that where an administrative body as the result of exercising its discretion has granted a re-hearing that it may attach whatever reasonable and fair requirements it wishes in granting a re-hearing. Respondent has been unable to find any authority one way or another, but it is believed that if a hearing Board is restricted as to the types of evidence which it may consider on the original hearing that it necessarily follows that upon re-hearing the same restrictions will apply, otherwise a Board by granting a re-hearing could make a mockery of the entire administrative process, and by granting a re-hearing subject to such conditions as it should see fit to impose could, in effect, defeat the very purposes of a re-

hearing and prevent the person granted such re-hearing from rectifying the errors the allegations concerning which were the very basis for the re-hearing.

III.

Respondent Exhausted His Administrative Remedy to the Extent That He Was Required to.

The facts as shown by the record, disclose that petitioner used every method available to obtain administrative correction of the error of which he complained.

When the time for rehearing approached and respondent and his counsel discovered that the Veterans Administration reports had been added to his records, immediate request was made for their elimination (Complaint Par. 9, R. 4-5). This request was refused and reconsideration was asked and refused. This, respondent contends, was an exhaustion of his administrative remedies and resulted in injury to him.

He has not only a right to review, he has a right to review on a certain record. Denial of review on such a record is denial of the statutory review which the Congress intended he should have, and in substitution therefor a review according to the views of the Department of the Army.

Having been placed in a position where he is injured, where there is no possibility of rectification of the injury by those who have perpetrated it, there can be no question of prematurity in seeking court relief.

> "A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that the need is sufficiently compelling to justify judicial intervention even before a completion of the administrative process." *Eccles* v. *Peoples Bank*, 333 U. S. 426, 434.

This case is the exact opposite of that in *Eccles* v. *Peoples Bank, supra*. There the bank sought a declaratory judg-

ment against the Federal Reserve Bank. There the bank had been admitted to the Federal Reserve System upon a condition requiring it to withdraw upon notice if an interest in the bank should be acquired by a holding company without the Board's prior approval. Shares in the bank had been acquired by a holding company and the bank had advised the Board of this fact and requested to be relieved of the condition. The Board refused this request and the bank, fearing that the Board might invoke the condition, sought a declaratory judgment to have the condition declared invalid. In holding that the action was premature the Supreme Court, speaking through Mr. Justice Frankfurter, said at Page 432 of the opinion:

> "Thus, the Bank seeks a declaration of its rights if it should lose its independence, or if the Board of Governors should reverse its policy and seek to invoke the condition even though the Bank remains independent and if then the Directors of the Federal Deposit Insurance Corporation should not change their policy not to grant deposit insurance to the Bank as a non-member of the Federal Reserve System. The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations."

The respondent did not seek judicial relief upon any speculative state of facts. There is no question here as to whether or not the disputed Veterans Administration reports would have been included in the appellant's record. It had been definitely ruled that they would be and appellant was not premature in seeking judicial relief.

A. The exhaustion doctrine does not apply in all events to all cases, nor was respondent required to proceed to hearing and decision before he could invoke the protection of the court.

If the respondent had proceeded to hearing without first having sought Court relief, he would never have been in a position to request relief from any Court subsequent to

hearing and decision. The statute provides that after the Army Review Board has reached a decision that decision "shall be transmitted to the Secretary of the Army and shall be laid by him before the President for his approval or disapproval and orders in the case." That a court may not review the action of the President in such a case is established by many cases, one of the most recent of which is *Chicago & Southern Airlines, Inc.* v. *Waterman Steamship Corporation*, 333 U. S. 103. Conceding, *arguendo*, that there would be some method of obtaining judicial review of the decision of the Board immediately after it had been filed, there would be no way to restrain consideration of such decision by the President and his action pending court review would render the question moot. *U. S. ex rel. Norwegian Nitrogen Products Company* v. *Tariff Commission*, 274 U. S. 106, 111-112.

That the exhaustion doctrine is not to be applied in all cases and under all circumstances is well exemplified in a recent case in this Court.

In *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, the Supreme Court ruled that a "jurisdictional frustration" on an administrative level could be disposed of by a declaratory judgment determining which of two divisions of the National Railroad Adjustment Board had jurisdiction over disputes involving railroad yardmasters. The two divisions had been unable to agree as to which had jurisdiction (surely a matter for decision by the administrative board) and one of them applied for a declaratory judgment that it had sole jurisdiction. As stated review was granted, although there had been no exhaustion of administrative remedies and under a statute which the Court had held in two recent previous cases had been drawn in such a way as to preclude judicial review of jurisdictional disputes arising under the statute.

The usual arguments for applying the exhaustion doctrine, such as interference with orderly administration, adequate remedy at law, use of the agency's specialized

understanding and statutory requirement of final order do not apply here. Granting of the relief sought here will insure orderly administration, not interfere with it; there is no remedy at law; the agency's specialized understanding has been used to distort the meaning of the term "service records"; there is no provision for review of a final order and consequently no statutory requirement therefor.

B. When an administrative body has taken action which denies a basic right, the courts may and do review such action before the administrative process has been completed.

The requirement that the administrative process must be completed before recourse may be had to the courts, is like most rules of law, subject to exceptions and qualifications. It is true that in many cases dealing with preliminary and procedural rulings the courts have declined to intervene until a final order, entered by the administrative body, had terminated the proceeding before the administrator and the whole proceeding would be thus ripe for review, and the reviewing court could thus dispose of procedural questions and those on the merits in one proceeding. In those cases, however, there has been a statutory right of review before a specified Court. In this case there is no provision or review and it is highly doubtful if the final order will be reviewable.

The courts, however, have never held that they were powerless to intervene in cases where a statutory, equitable, or constitutional rights was denied and where there was no adequate remedy to correct the wrong by Court review after the matter had proceeded to final disposition by the administrative agency. Illustrative of the application of this rule are the following cases:

Utah Fuel Company v. *National Bituminous Coal Commission*, 306 U. S. 56. In that case plaintiff, a producer of coal had, in conformity with statutory command fur-

nished the Coal Commission with certain cost figures. Thereafter, the Commission announced that it would give public notice of a hearing and would permit the cost figures to be introduced in evidence. Plaintiffs objected on the ground that the disclosure of the cost figures was prohibited by the statute; the Commission ruled otherwise, and plaintiff sought an injunction in the District Court for the District of Columbia. That Court dismissed for failure to state a cause of action; the Court of Appeals concluded that the District Court had no jurisdiction. The Supreme Court held that this was error; that the District Court had jurisdiction but properly dismissed on the merits.

At pages 59 and 60 the Court said:

> "We are unable to accept the view of the Court of Appeals. The District Court correctly ruled that the bill fails to state a cause of action and for that reason properly directed the bill dismissed.
>
> "A question cognate to the one here presented was before us in *Shields* v. *Utah Idaho C. R. Co.* (305 U. S. 177, ante, 111, 59 S. Ct. 160), decided December 5, 1938, the date of the Court of Appeals' decision herein. We there declared, although determination by the Interstate Commerce Commission that a railroad was not 'interurban' did not constitute an 'order' reviewable under the Urgent Deficiencies Act of October, 1913, nevertheless, in the circumstances disclosed, it could be subjected to judicial review by bill in equity. 'Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions.'"

Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be "determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether

well founded or not." *Hart* v. *B. F. Keith Vaudeville Exch.*, 262 U. S. 271, 273; also *Binderup* v. *Pathe Exch.*, 263 U. S. 291, 305; *United States* v. *Archibald McNeil & Sons*, 267 U. S. 302, 307.

In *United States ex rel. Kansas City Railway Co.* v. *Interstate Commerce Commission*, 252 U. S. 178, the Supreme Court held that the Interstate Commerce Commission could be compelled by mandamus to receive evidence where the statute had laid upon the Commission the duty of deciding a matter which required consideration of the proffered testimony. The writ of mandamus was applied for and issued before the final order disposing of the case was filed by the Commission.

Perkins v. *Elg*, 307 U. S. 328, involved a proceeding for an injunction against the Secretary of Labor to restrain that official and the Commissioner from prosecuting proceedings for deportation against Elg and against the Secretary of State from refusing to issue a passport to her upon the ground that she was not a citizen of the United States and also for a declaratory judgment that she was a citizen of the United States. The suit originated in the District Court for the District of Columbia, the relief prayed was granted except as to the Secretary of State; the Court of Appeals affirmed (69 App. D. C. 175, 99 F. (2d) 408) and the Supreme Court affirmed but modified the decree to include the Secretary of State. Here was a clear interference by the judiciary in an administrative proceeding before its conclusion. The Court of Appeals plainly recognized this by saying at page 180:

> "There can be no doubt that the lower court had jurisdiction of the several defendants and that it has jurisdiction of the subject matter of the suit. There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. Appellants, Secretary of Labor and

> Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threatened her with arrest and deportation."

Even though court review by habeas corpus after arrest may be an unpleasant method it is nonetheless a review, but the three courts which decided the *Elg* case evidently felt that in view of the fact that under the Constitution Elg was a citizen and had a clear right to remain in this country, she would not have to "exhaust her administrative remedies" but was entitled to enjoin the administrative proceeding to deport her. The fact that the Secretary of Labor had "primary jurisdiction" to determine whether or not Elg was an alien or a citizen did not impede the courts in giving her the relief to which she was obviously entitled.

An authoritative discussion of the right to assert in the courts a statutory right is found in *Dismuke* v. *United States*, 297 U. S. 166 where the Court by Stone, J. states at page 172:

> "But, in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; *United States* v. *Atchison, T. & S. F. R. Co.*, 249 U. S. 451, 454, 63 L. ed. 703, 704, 39 S. Ct. 325; *Ness* v. *Fisher*, 223 U. S. 683, 56 L. ed. 610, 32 S. Ct. 356. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein* v. *United States*, 266 U. S. 221, 225; *United States* v. *Williams*, 278 U. S. 255, 257, 258; *Meadows* v. *United States*, 281 U. S. 271, 274; *Degge* v. *Hitchcock*, 229 U. S. 162, 171, or by failing to follow a procedure which satisfies elementary standards of

fairness and reasonableness esential to the due conduct of the proceeding which Congress has authorized, *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 330, 331. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled."

The fact that petitioner has ruled that he will interpret the statute, and will decide what documents are to be included in appellant's record is in no way binding upon this court.

"An agency may not finally decide the limits of its statutory power. That is a judicial function."
Social Security Board v. *Nierotko*, 327 U. S. 358, 369.

IV.

Mandamus Is the Appropriate Remedy.

Respondent has no quarrel with the general principles stated in petitioner's brief commencing on page 50. Respondent contends, however, as he did below and as the Court of Appeals ruled that the statute under consideration is clear and unambiguous and requires no construction. If it requires construction, then the meaning of the term "service records" is so free from doubt, especially to military men, that the construction placed upon it is so clearly wrong that it may be set aside by mandamus.

The reports of this Court and the Court of Appeals for the District of Columbia abound with cases dealing with mandamus. Respondent sees no reason to cite and discuss these many cases, as the rules stated therein are not open to dispute, and respondent feels that they are of little aid in deciding the question involved in this case. As stated by the Court of Appeals in its opinion (R. 26) the hornbook rule has been recently well stated by that Court (*Hammond* v. *Hull*, 131 F. 2d. 23, 25) as follows:

> "The writ [mandamus] should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory . . . ."

The case of the *United States ex rel* v. *Interstate Commerce Commission*, 252 U. S. 178, respondent submits is closely related to this case. In that case an action had been brought to compel the Interstate Commerce Commission to consider evidence which a statute had expressly required it to consider. There, as in this case, administrative action had not been completed. It seems obvious to respondent, and we urge upon the Court, that if mandamus will lie to compel the consideration of evidence which a statute requires to be considered that it necessarily follows that mandamus will also lie to compel the exclusion of evidence which the statute forbids.

The respondent stresses again, as he did in his brief in opposition and also in the Courts below, that this action in no way attempts to obtain judicial control over the merits of the case. If the decision of the Court of Appeals is permitted to stand, the case will proceed to hearing before the Disability Review Board without any intimation from any Court as to how the respondent's application for review should be decided. For this reason respondent submits that *Reaves* v. *Ainsworth*, 219 U. S. 296, even though it involves the case of a discharged Army officer has no bearing on this case as in *Reaves* v. *Ainsworth*, it was attempted to have the Court substitute its judgment for that of any Army Board, and to annul an order of the President discharging the plaintiff from the Army.

CONCLUSION.

Respondent submits that the decision of the Court of Appeals is correct and should be affirmed.

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